

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, Misc., October Term, 1983

GREGORY ARNOLD MURPHY)

Petitioner)

VS.)

COMMONWEALTH OF KENTUCKY)

Respondent)

83-5352

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

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CERTIFICATE

I do hereby certify that a copy of this Petition was served,
by depositing the same in a United States mailbox, with first class
postage prepaid, to Hon. Eileen Walsh, Assistant Attorney General of
Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for
Respondent, on September 2, 1983.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The petitioner, Gregory Arnold Murphy, prays that a Writ of Certiorari be issued to review the decision herein of the Supreme Court of Kentucky.

QUESTIONS PRESENTED

- I. IS THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE LAW PRECLUDING A CRIMINAL CONVICTION IN THE ABSENCE OF CORROBORATION OF AN ACCOMPLICE'S TESTIMONY IS REPEALED AND SAID REPEAL IS APPLIED RETROACTIVELY?
- II. DOES THE FAILURE OF A STATE TRIAL COURT TO DELETE A DEFENDANT'S NAME FROM AN INCRIMINATING STATEMENT MADE BY A CO-DEFENDANT, WHO TESTIFIED AFTER THE DEFENDANT GAVE HIS TESTIMONY AT TRIAL, AMOUNT TO SUBSTANTIAL CONSTITUTIONAL ERROR BY FORCING A DEFENDANT TO YIELD ONE CONSTITUTIONAL RIGHT AT TRIAL IN ORDER TO PROTECT ANOTHER?

TABLE OF CONTENTS

OPINIONS BELOW	Page 1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-4
REASONS FOR GRANTING REVIEW	5-7
ARGUMENT	7-17
CONCLUSION	18
APPENDIX	

TABLE OF AUTHORITIES

<u>Beazell v. Ohio</u> , 269 U.S. 167, 169-170 (1925)	13
<u>Bouie v. City of Columbia</u> , 378 U.S. 347, 353 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964)	11
<u>Bowyer v. United States</u> , D.C. App., 422 A.2d 973 (1980)	14
<u>Bruton v. United States</u> , 391 U.S. 12 (1968)	17
<u>Calder v. Bull</u> , 3 U.S. 386 (1798)	13
<u>Commonwealth v. Brown</u> , Ky., 619 S.W.2d 699, 703 (1981)	5,8,10,11,12,1
<u>Government of Virgin Islands v. Civil</u> , 591 F.2d 255 (3rd Cir. 1979)	14
<u>Hopt v. Utah</u> , 110 U.S. 574 (1884)	12,14,15
<u>Kring v. Missouri</u> , 107 U.S. 221, 228-229 (1883)	13
<u>Marks v. United States</u> , 430 U.S. 188, 191-192 (1977)	11
<u>Mishler v. Commonwealth</u> , Ky., 556 S.W.2d 676 (1977)	10
<u>Gregory Arnold Murphy v. Commonwealth of Kentucky</u> , (No. 81-SC-572-MR) [Ky., 652 S.W.2d 69 (1983)]	1,10,11,12,14, 15,16,17
<u>Rabe v. Washington</u> , 405 U.S. 313 (1972)	11
<u>Simmons v. United States</u> , 390 U.S. 377 (1968)	6,17
<u>Smith v. Commonwealth</u> , Ky., 599 S.W.2d 900, 903 (1980)	10
<u>State v. Beyers</u> , 627 P.2d 788, 796 (Idaho, 1981)	14,15
<u>United States v. Henson</u> , 486 F.2d 1292 (D.C. Cir. 1973)	14
<u>United States v. Williams</u> , 475 F.2d 355 (D.C. Cir. 1973)	14
<u>Weaver v. Graham</u> , 450 U.S. 24, 31 (1981)	11,13

Page

CONSTITUTIONAL PROVISIONS - UNITED STATES

Article I, Section 10	2,7
Fifth Amendment	2,7,11
Sixth Amendment	2,16
Fourteenth Amendment	2,7,11

MISCELLANEOUS

28 U.S.C. §1257(3)	2
Black's Law Dictionary, p. 257, 5th Ed. 1979	15
1854 Criminal Code, Section 239	12
Hall, <u>General Principles of Criminal Law</u> , (2nd Ed. 1960)	11
Kentucky Constitution	10
Kentucky Rule of Criminal Procedure (RCr) 9.62	3,4,5,7,8,10, 11,12,13,14, 15,16
Sup.Ct.R. 20.1	2
Sup.Ct.R. 21.1(i)	4

OPINIONS BELOW

The Circuit Court of Jefferson County, Kentucky, rendered no written opinion in this case. Following a jury trial, the petitioner was convicted of murder [Ky. Rev. Stat. (KRS) 507.020] on February 10, 1981. (Transcript of Record, hereafter TR, 295-297). On April 2, 1981, the Jefferson Circuit Court entered final judgment and the petitioner was sentenced to life imprisonment. (Appendix, hereafter App., 11-13; TR 295-297).

On direct appeal, the Supreme Court of Kentucky affirmed the petitioner's conviction on May 11, 1983. The appeal was styled Gregory Arnold Murphy v. Commonwealth of Kentucky, (No. 81-SC-572-MR) [App. 1-9 Ky.; 652 S.W.2d 69 (1983)]. A timely petition for rehearing was filed on May 26, 1983 (App. 9A) and was denied on July 6, 1983 (App. 10).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Kentucky Supreme Court affirmed the petitioner's conviction on May 11, 1983. A timely petition for rehearing was thereafter filed by the petitioner. The order of the Kentucky Supreme Court denying the petitioner's petition for rehearing was entered on July 6, 1983, and this petition is timely filed within sixty (60) days thereafter. Sup. Ct. R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 10

No State shall...pass any bill of attainder, ex post facto law ...

FIFTH AMENDMENT

No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 18, 1979, at approximately 10:30 a.m., the body of Kim Keller was found in an alley behind 4008 Greenwood Avenue in Louisville, Kentucky (Transcript of Evidence, hereafter TE, 90-91, 93, 103). Medical evidence indicated that the cause of death had been ligature strangulation sometime within the twelve hours preceding discovery of her body (TE 117, 122, 129, 131, 134, 140).

The petitioner, Gregory Arnold Murphy, was arrested and tried, along with a co-defendant, Norman Crittenden, for the murder of Kim Keller. Virtually all of the evidence given against the petitioner was contained in the statements and testimony of the co-defendant, Crittenden. (TE 202-208, 453-496).

The petitioner testified in his own defense that he was home at the time of the death of Kim Keller (TE 311-320, 325-326, 345-346, 365-366, 370-378). The petitioner stated that he had been with Crittenden until about 7:00 or 8:00 p.m. on October 17, 1979, until Crittenden left the petitioner's house (TE 318, 346, 374). The petitioner's testimony concerning his whereabouts on October 17-18, 1979, was corroborated by the testimony of his wife and father (TE 396-400, 409-422).

At the close of the evidence, the petitioner tendered an instruction to the jury on accomplice testimony that was in conformance with the Kentucky Rule of Criminal Procedure (RCr) 9.62 (App. 14; TR 260-261; TE 635-639) which had been in effect at the time of the murder. RCr 9.62 required that accomplice testimony be corroborated before it could sustain a conviction. The trial court refused to give the instruction (TE 635-639).

The petitioner was convicted of murder and the jury fixed his punishment at life imprisonment (TE 679; Transcript of Record, hereafter TR, 267, 273). A mistrial was declared as to the case against Norman Crittenden because the jury was deadlocked 11 to 1 for not guilty (TE 680-681). Judgment was entered in accordance with the jury's recommendation and a sentence of life imprisonment was imposed upon the petitioner (App. at 11-13; TR 295-297).

Further facts will be developed as necessary in the arguments presented herein.

In conformance with Sup. Ct. R. 21.1(1), the petitioner states that the constitutional issues raised herein have been properly raised and presented to the trial court and the appellate court below.

With respect to the issue concerning creation of an ex post facto law, the petitioner requested that the jury be instructed on the law as enunciated by former RCr 9.62. The trial court declined to give said instruction (App. 14; TR 260-261; TE 635-639). On direct appeal to the Kentucky Supreme Court, the petitioner argued alternatively that he was entitled to a directed verdict of acquittal due to the lack of corroboration of the accomplice's testimony or that he was entitled to the requested instruction. Following the decision entered by the Kentucky Supreme Court herein (App. 1-9), the petitioner filed a timely petition for rehearing on the ground that the decision herein violated the constitutional prohibition against ex post facto laws (App. 13A). Said petition for rehearing was denied (App. 10).

As to the issue involving the failure of the trial court to delete reference to the petitioner made in incriminating statements of the co-defendant, that issue was raised on direct appeal (App. 2) and in the trial court. The manner in which the issue was raised in the trial court follows.

Prior to trial, defense counsel moved that any reference to the petitioner by the co-defendant, Crittenden, in his statements be deleted (TE 62). The motion was overruled (TE 62). The motion was renewed during the testimony of Detective Sherrard who obtained a tape recorded statement from Crittenden on September 3, 1980 (TE 195-198) and again was overruled (TE 198). The tape recording was played without deleting the name of the petitioner (TE 206). The jury was admonished by the court and defense counsel moved for a mistrial (TE 206-207). The motion was overruled (TE 207). Defense counsel also objected to the introduction of Crittenden's written statement of October 30, 1979 (Defendant Crittenden's Exhibit No. 1) and the motions were overruled (TE 251-253, 483-484, 505). At the close of the case for the Commonwealth and the case for the defense, the court overruled the petitioner's renewed motions for a mistrial for failure to excise the petitioner's name from the co-defendant's statements (TE 300, 634-635).

REASONS FOR GRANTING REVIEW

I.

The petitioner was accused of committing a crime which occurred in October, 1979. Kentucky Rule of Criminal Procedure 9.62 (RCr 9.62) was in effect at that time. The rule stated that "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense..." and merely proving that a crime was committed was not sufficient corroboration. The accomplice corroboration rule was repealed on September 1, 1980.

The defendant was tried and convicted of murder in a state court in February, 1981. Defense counsel requested that a jury instruction be given which set out the law as enunciated in former RCr 9.62. The request was denied by the trial court.

In September, 1981, the Kentucky Supreme Court, relying on the federal and state constitutional prohibitions against ex post facto laws, ruled that former RCr 9.62 was fully applicable to cases involving crimes which occurred prior to the effective date of the repeal of RCr 9.62, i.e., September 1, 1980. See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981). (App. 20).

In the case at bar, Commonwealth v. Brown, supra, was overruled and the Kentucky Supreme Court held that the repeal of RCr 9.62 was to be retroactive in its application and the petitioner was therefore not entitled to safeguards provided by the accomplice corroboration requirement. The Kentucky Supreme Court held in the case at bar, that retroactive application of the repeal of RCr 9.62 did not violate the constitutional prohibition against ex post facto laws.

Former RCr 9.62 precluded conviction for a criminal offense in the absence of corroboration of an accomplice's testimony. The repeal of RCr 9.62 allows a defendant to be convicted solely on the testimony of an accomplice to the alleged crime. The repeal of RCr 9.62 clearly permits the prosecution to obtain a criminal conviction on less evidence than that which was required by the accomplice corroboration requirement. In light of the explicit prohibition against

creation of ex post facto laws, the case at bar presents an important question of constitutional law. Moreover, the issue involved herein is likely to have a significant national impact because accomplice corroboration requirements are currently in effect in fifteen other states. (App. at 15). In addition to Kentucky, two other states and the Virgin Islands have repealed their accomplice corroboration requirements (App. at 15). The Kentucky Supreme Court, by concluding that its decision herein does not violate the constitutional prohibition against ex post facto laws, sets a significant constitutional precedent that could have substantial impact on many other jurisdictions.

The petition for a writ of certiorari should be granted in light of the important question of constitutional law presented and the national impact that a ruling on the issue will have.

II.

Prior to trial, defense counsel moved to delete any reference to the petitioner which was made by the co-defendant in statements given to the police by the co-defendant. The motion was overruled. Defense counsel objected to the admission of all of the co-defendant's statements which made references to the petitioner by name. All objections were overruled. Although the co-defendant testified, he did so only after the petitioner testified.

The specific issue presented by the foregoing facts involves a substantial question of constitutional law which has not been directly addressed by this Court. In Simmons v. United States, 390 U.S. 377 (1968), this Court indicated that a defendant in a criminal case should not be put in the position of having to surrender one constitutional right at trial in order to protect another right. This precise situation occurred in the case at bar. The trial court failed to delete references to the petitioner in incriminating statements made by the co-defendant. In order to rebut the statements made by the co-defendant, the petitioner was forced to surrender his right to remain silent without knowing whether he would be able to exercise his right to confront and cross-examine the co-defendant.

Given the number of joint trials of co-defendants in state and federal courts, the problem presented herein is likely to occur on a frequent basis. The issue presented is one of major importance and the case at bar reflects the need for this court to address the questions raised and establish guidelines for all state and federal courts which are likely to be confronted with the same problem.

ARGUMENT

- I. BY DECIDING THAT FORMER RULE OF CRIMINAL PROCEDURE (RCr) 9.62, WHICH ALLOWED CONVICTIONS ONLY WHEN ACCOMPLICE TESTIMONY IS CORROBORATED, DOES NOT APPLY TO THE CASE AT BAR, THE KENTUCKY SUPREME COURT HAS CREATED AN EX POST FACTO LAW IN VIOLATION OF ARTICLE I, SECTION 10 AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The alleged crime in the case at bar occurred in October, 1978. At that time RCr 9.62 (App. 14) entitled "Testimony of Accomplice" was in effect and provided that:

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

RCr 9.62 was abolished by the Kentucky Supreme Court on September 1, 1980. The petitioner was tried and convicted in Jefferson Circuit Court in February, 1981 (App. 11-13; TR 295-297). In September, 1981, the Kentucky Supreme Court ruled that RCr 9.62 was fully applicable

to crimes alleged to have occurred prior to repeal of that rule of law. The court held that to conclude otherwise would violate the constitutional prohibition against Ex Post Facto laws. See Commonwealth v. Brown, Ky., 619 S.W.2d 699, 703 (1981) (App. 20).

At the close of all proof in the case at bar, the petitioner tendered the following instruction in conformance with RCr 9.62 (App. 14; TR 260-261; TE 635-639).

2. ACCOMPLICE TESTIMONY

An accomplice is one of two or more persons participating in the commission of a crime, either as a principal actor in its commission or one who is present and is assisting or is encouraging or holding himself in readiness to assist in its commission. If you believe from the evidence that the witness, Norman Crittenden, was an accomplice in the murder mentioned in the indictment, then you cannot convict the defendant, Gregory A. Murphy, on the basis of testimony of the said Norman Crittenden unless it is supported by other substantial evidence tending to connect the defendant, Gregory A. Murphy, with the commission of the offense in question, and any other evidence is not sufficient for that purpose if it merely shows that such offense was committed by someone and the circumstances under which it was committed. The court instructs you as a matter of law that Norman Crittenden is an accomplice in the offense charged by virtue of his testimony.

The trial court refused to give the requested instruction (TE 635-639).

In the case at bar, but for the pre-trial statements and trial testimony of the co-defendant, Norman Crittenden, there was no direct evidence implicating the petitioner in the death of Kim Keller on October 18, 1979 (TE 454, 457-462, 477).

The co-defendant, Crittenden, on October 30, 1979, had given a written statement to the police (TE 195). The statement, in essence, claimed that the petitioner, Crittenden, and Kim Keller were together during the early morning hours of October 18, 1979, and that the petitioner and Keller were arguing. Crittenden said that he witnessed the petitioner hit Keller and then strangle her with a cord. In this written statement, Crittenden portrayed himself as merely a witness to the crime. However, in a tape recorded statement made on September 3, 1980, Crittenden admitted holding Keller's arms and legs while, he claimed, the petitioner strangled her (TE 195-196, 202-208).

Both the detective who tape recorded the statement, and an Assistant Commonwealth's Attorney who observed the taping, testified that Crittenden admitted, before the statement was taped, that he had helped pull on the cord around Keller's neck (TE 207-208, 256-257). When Crittenden testified at trial, he repeated much of the statement, but denied that he had held Keller's arms and legs, or that he had pulled on the cord around her neck (TE 464, 471, 479).

Reinella Sue Coates testified that the petitioner and Crittenden had come by her motel room to try to arrange a prostitution date (TE 158-159, 165, 167, 170-171, 178). She said both men were drinking heavily and that the petitioner was playing with a piece of string while he was talking to her (TE 159-160, 179). Coates said the men asked her where they could find Kim Keller or Debbie Wilkerson. After she had told them that she didn't know, they drove off. (TE 160-161). Coates also testified that Crittenden had threatened to kill Keller a few weeks before her death. She said that she and the petitioner were present when Crittenden made the threats. (TE 163-164, 175, 182-186).

A fragment of hair from a black person was found on Kim Keller's pants but there was absolutely no evidence that the hair fragment belonged to the appellant.

The petitioner testified that he was home at the time of Keller's death (TE 311-320, 325-326, 365-366, 370-378). The petitioner said he had been with Crittenden on the night of October 17, 1979, until Crittenden left the petitioner's house around 7:00 or 8:00 p.m. (TE 318, 346, 374). He denied any involvement in the killing of Keller and specifically denied the truth of Norman Crittenden's statements. (TE 343-344, 349, 351, 358, 379-394). The petitioner's testimony concerning his whereabouts on October 17, 1979, was corroborated by the testimony of his wife and father (TE 396-400, 409-422).

As can be seen from the foregoing, there was no direct evidence presented against the petitioner to connect him with the murder of Kim Keller, except the statements and testimony of Norman Crittenden. According to his tape recorded statement, Crittenden claimed he helped restrain Keller while the petitioner allegedly strangled her. Prosecution witnesses also indicated that Crittenden